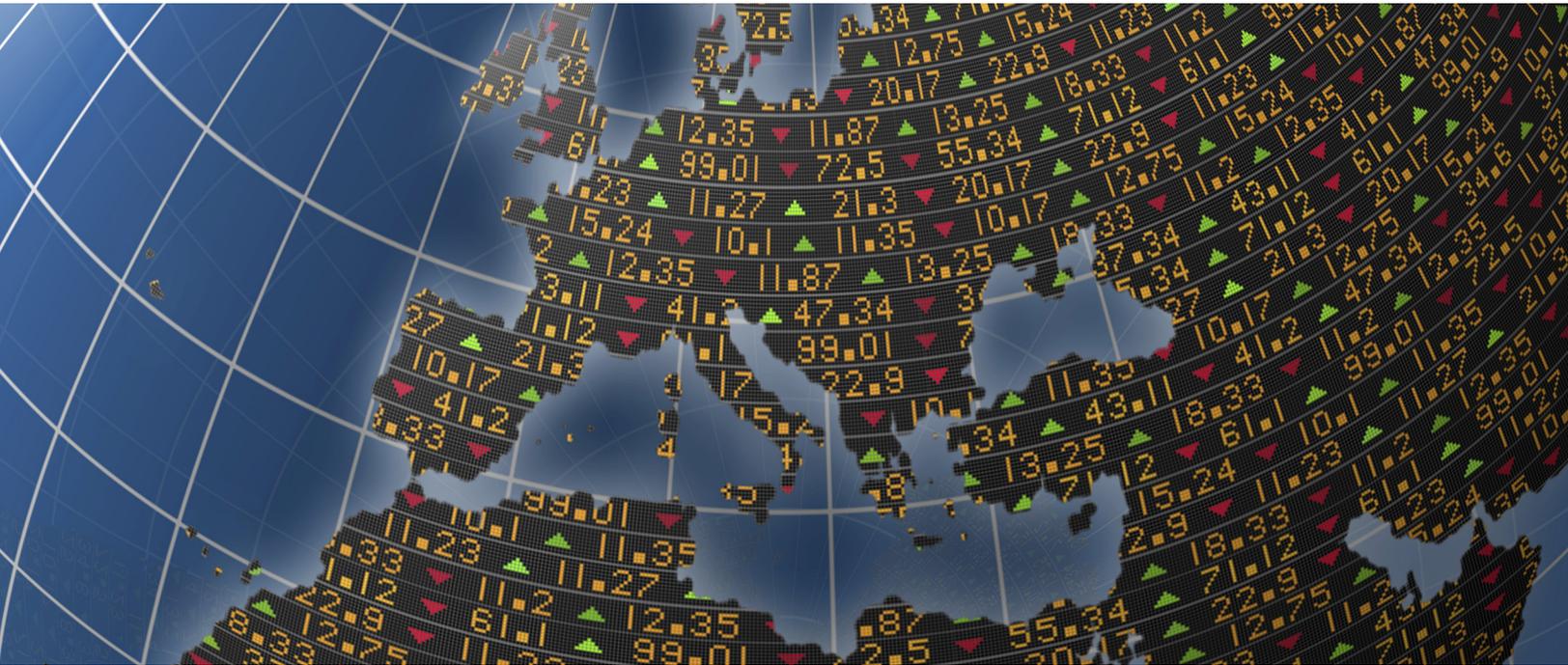


# FCPA Update

A Global Anti-Corruption Newsletter



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Peter Solmssen

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[pferez@debevoise.com](mailto:pferez@debevoise.com)

## Biden Administration's Strategy on Countering Corruption Seeks New Era of Global Anti- Corruption Enforcement and Cooperation

On December 6, 2021, the Biden Administration released the first U.S. Strategy on Countering Corruption (the "Strategy"), designed to marshal the federal government's full resources to combat global corruption.<sup>1</sup> This 38-page document follows the Administration's release in June of a National Security Study Memorandum (the "Memorandum") establishing the fight against corruption as a core national security priority.<sup>2</sup> That Memorandum launched an interagency

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1. "United States Strategy on Countering Corruption" (Dec. 6, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.
2. "Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest" (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>; "President Biden Declares the Fight Against Corruption a National Security Priority and Directs Federal Agencies To Enhance Enforcement," Debevoise Update (June 7, 2021), <https://www.debevoise.com/insights/publications/2021/06/president-biden-declares-the-fight>.

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review—including the Departments of Justice, Treasury, and State, and the intelligence agencies—that in turn yielded the Strategy.

Under the Strategy, the U.S. government will seek to enhance its anti-corruption efforts, both “domestically and internationally, [and] with governmental and non-governmental partners, to prevent, limit, and respond to corruption and related crimes.”<sup>3</sup> In the particular, the Strategy articulates five pillars:

1. Modernizing, coordinating, and resourcing U.S. government efforts to better fight corruption;
2. Curbing illicit finance;
3. Holding corrupt actors accountable;
4. Preserving and strengthening multilateral anti-corruption architecture; and
5. Improving diplomatic engagement and leveraging foreign assistance resources to advance policy objectives.

As discussed below, the Strategy constitutes a sweeping effort to implement organizational, policy, and enforcement changes across numerous agencies to strengthen the government’s ability to combat corruption. Among other things, the Strategy calls for:

- Bringing **aggressive enforcement action** against corrupt actors, money launderers, and “gatekeepers” who enable them, and working cooperatively across the federal government and with international partners to support investigations and prosecutions;
- Enacting **new and enhanced anti-money laundering regulations**, including reexamining proposed rules that would prescribe **minimum AML standards and other rules for investment advisors** like private equity funds, hedge funds, and trusts;
- Developing a **database of the beneficial owners** of anonymous shell companies and certain other entities, in order to identify corrupt actors; and
- Reviewing the risk posed by **digital assets**, and implementing policies and regulations to prevent the use of such assets to support criminal activities like corruption, fraud, and sanctions evasion.

The Strategy carries significant implications for companies that operate internationally, as well as gatekeepers like lawyers, accounting firms, and certain financial institutions. We expect the Strategy to lead to a further focus on

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3. Strategy at 4.

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enhancing AML regulations and heightened enforcement activity, both domestically and in countries that partner with the U.S. on anti-corruption efforts.

### **Pillar One: Modernizing, Coordinating, and Resourcing U.S. Government Efforts to Better Fight Corruption**

The first pillar aims to advance the federal government's understanding of the fight against corruption in order to modernize its anti-corruption efforts. With help from the intelligence community, federal agencies will augment their research and data collection efforts to better understand corrupt actors, the networks they operate in, and the dynamics at play in different industries and regions. Agencies are also directed to leverage academic, media, and private sector research to gain a fuller view of the threat landscape. The Strategy specifies that the Administration will work with Congress to allocate resources necessary for these improvements.<sup>4</sup>

**“[T]he Strategy constitutes a sweeping effort to implement organizational, policy, and enforcement changes across numerous agencies to strengthen the government's ability to combat corruption.”**

The Strategy also emphasizes the need for better information sharing, both among government bodies and with the public. To achieve this, Pillar One includes organizational changes aimed at increasing coordination and collaboration, like the establishment of new units dedicated to fighting corruption across a number of agencies, including task forces at the Department of Commerce and USAID, and a coordinating body at the Department of Treasury.<sup>5</sup>

These newly organized anti-corruption units will support increased enforcement of anti-corruption laws. The Anti-Corruption team at the Treasury Department, for example, is expected to implement new initiatives focused on financial crimes, economic sanctions, and criminal tax investigations. This builds on the Administration's proposal—set forth in its 2022 budget request—to increase significantly FinCEN's resources to build more advanced tracking systems that identify fraud, money laundering, and proliferation financing.<sup>6</sup>

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4. *Id.* ¶¶ 17-19.

5. *Id.* ¶¶ 18-19.

6. *Id.*

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Recognizing the international nature of anti-corruption work, Pillar One also directs the government to work with international partners to combat corruption both in the United States and abroad. While cross-border collaboration on anti-corruption enforcement is already a well-established priority, the Strategy emphasizes the need for collaboration at the policy level as well. The State Department will lead outreach to foreign partners to align on policy priorities and assist with implementation.<sup>7</sup>

### Pillar Two: Curbing Illicit Finance

Pillar Two is based in significant part on the principle that international money laundering is deeply entwined with corruption. The Strategy seeks to prevent corrupt actors—and their facilitators—from taking advantage of vulnerabilities in the U.S. and international financial systems to hide and invest the proceeds of their criminal activity.

The Strategy directs agencies to address gaps in the current anti-money laundering regime, including through the following initiatives:

- **Possible new requirements for investment advisors.** The Strategy notes that certain investment entities—like private equity funds, hedge funds, and trusts—are not currently subject to strong AML obligations, and that corrupt actors therefore may be able to use these entities to invest their profits and evade detection. In order to close this gap, the Treasury Department will revisit a 2015 Notice of Proposed Rulemaking that would require minimum standards for AML programs and new requirements for suspicious activity reporting for these investment entities.<sup>8</sup>
- **Implementing the Corporate Transparency Act.** The Treasury Department will create a beneficial ownership database to track possible corrupt actors that use shell companies and other legal structures to conceal ill-gotten gains. This database will seek to provide U.S. law enforcement, for the first time, with quick and accurate access to beneficial ownership information.<sup>9</sup>
- **Gatekeepers.** The Strategy states that the current AML regime fails to cover adequately key gatekeepers like lawyers, accountants, and incorporators who may facilitate or enable money laundering and other financial crimes. To address this, the Administration will consider new ways to reach these actors, including

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7. *Id.* at 19.

8. *Id.* at 22.

9. *Id.* at 20. See also "FinCEN Proposes Beneficial Ownership Reporting Rule," Debevoise in Depth (Dec. 10, 2021), <https://www.debevoise.com/insights/publications/2021/12/fincen-proposes-beneficial-ownership>.

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by seeking harsher penalties, working with Congress to expand substantive law and gain additional investigative authority over these actors, and working with states to impose professional sanctions where appropriate.<sup>10</sup>

- **Accountability in government procurement.** Future regulations implementing Section 885 of the National Defense Authorization Act will require prospective federal contractors and contract grantees to disclose ownership information to the government.<sup>11</sup> This requirement seeks to ensure that federal agencies know exactly with whom they are contracting to avoid involvement with corrupt actors or schemes. In addition, the Procurement Collusion Strike Force, a coordinated response team backed by DOJ's Antitrust Division, multiple U.S. Attorney's offices, the FBI, and Inspectors General from various agencies, will continue to investigate and lead enforcement against corrupt actors involving government procurement.<sup>12</sup>
- **New regulations on real estate transactions.** To combat money laundering through real estate transactions, the Treasury Department will promulgate regulations requiring reporting by those holding important information on real estate transactions. These regulations will augment existing strategies to gain insight into opaque real estate transactions, like "geographic targeting orders," which FinCEN has used to require title insurance companies to identify the natural persons behind legal entities used in certain all-cash real estate transactions.<sup>13</sup>
- **Assessment of art and antiquities markets.** Given the vulnerability of art and antiquities markets to a wide range of financial crime, the Treasury Department will study these markets to determine how they facilitate money laundering. FinCEN is also expected to issue a Notice of Proposed Rulemaking in 2022 on amendments to the Bank Secrecy Act that categorize individuals engaged in antiquities trading as financial institutions.<sup>14</sup>
- The Strategy also calls for the United States to work with international partners to address illicit finance. The Administration plans to expand U.S. involvement in networks like the Camden Asset Recovery Interagency Network and the International Anti-Corruption Coordination Center, among others, to further such cooperation with allies. The United States will also focus on supporting

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10. Strategy at 23.

11. *Id.* at 21.

12. *Id.*

13. *Id.* at 22.

14. *Id.* at 24; see also "Senate Subcommittee Report Highlights Money Laundering and Sanctions Risks in the Art Industry," Debevoise in Depth (Aug. 27, 2020), <https://www.debevoise.com/-/media/files/insights/publications/2020/08/20200827-senate-subcommittee-report-highlights.pdf>.

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investigations with the possibility of asset recovery by providing international partners with financial information critical to recovery, enforcing forfeiture and confiscation orders, and ensuring asset returns conform to the Global Forum on Asset Recovery principles.<sup>15</sup>

In line with the Administration's focus on gatekeepers, the United States will also encourage its allies to target international facilitators of financial crime. The Strategy identifies key international gatekeepers as those in the transportation, logistics, and construction industries, and especially those assisting in the movement of commodities like gold.

### Pillar Three: Holding Corrupt Actors Accountable

The Strategy's third pillar focuses on enforcing anti-corruption laws against entities and individuals who engage in bribery, kickbacks, and other forms of corruption. This pillar complements and builds upon the second pillar, which also focuses on law enforcement, but from an anti-money laundering perspective. As part of the third pillar, the Strategy calls for vigorous use of "proven tools" like the FCPA, as well as working with Congress on "new authorities to take on the corruption challenge as it stands today."<sup>16</sup>

Specifically, the Strategy seeks to hold corrupt actors accountable by (1) strengthening enforcement efforts domestically; (2) updating the enforcement tools to be utilized both in the United States and abroad; (3) collaborating with partners to implement complementary authorities and tools; (4) strengthening foreign governments' abilities to seek accountability justly and equitably; and (5) bolstering the ability of other actors, including members of civil society, media, and the private sector, to both prevent corruption and hold corrupt actors accountable.<sup>17</sup>

Certain key areas of focus are as follows:

- **FCPA.** Foreign bribery remains a top priority of the Biden Administration—a fact made clear not only by the Strategy, but also by a variety of recent policy speeches by DOJ and SEC officials.<sup>18</sup> The government will also continue to vigorously pursue forfeiture of ill-gotten gains. With increased funding and greater emphasis on coordination, law enforcement agencies are expected to work in partnership to support investigations and prosecutions. DOJ's

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15. Strategy at 24.

16. *Id.* at 11-12.

17. *Id.* at 12.

18. See, e.g., "DOJ Revises Corporate Criminal Enforcement Policies," FCPA Update (Nov. 2021), <https://www.debevoise.com/insights/publications/2021/11/fcpa-update-november-2021>.

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partnership with the FBI's International Corruption Unit—with squads in foreign offices investigating FCPA and kleptocracy cases—is cited as a successful model for future efforts.

- **Corrupt foreign officials.** The Strategy highlights the importance of criminalizing the demand side of bribery, a notable priority given that the FCPA only reaches bribe payors. The Administration will seek to work with Congress to expand criminal liability to those who solicit or accept bribes, and otherwise aggressively use money laundering and other statutes to pursue these actors where applicable. This notably aligns with recent guidance from the Organization for Economic Cooperation and Development, which, among other things, addresses the demand side of bribery and urges all countries to raise awareness of their public officials on bribery laws and publish rules and regulations for officials regarding gifts, entertainment, hospitality, and expenses.<sup>19</sup>

“The Strategy carries significant implications for companies that operate internationally, as well as gatekeepers like lawyers, accounting firms, and certain financial institutions. We expect the Strategy to lead to a further focus on enhancing AML regulations and heightened enforcement activity....”

- **International engagement.** The United States intends to work with international partners to create complementary regimes, coordinating on tax enforcement, sanctions, visa restrictions, and other areas of civil and criminal law that buttress anti-corruption efforts. For those countries where “government-to-government engagement” is not possible, the United States will seek to partner with the public and private sectors, as well as the media.<sup>20</sup>
- **Cryptocurrency.** A new task force, the National Cryptocurrency Enforcement Team (“NCET”), will assist DOJ in conducting investigations and prosecutions related to cryptocurrency. Deputy Attorney General Lisa Monaco announced NCET's creation on October 6, 2021, building on the DOJ Criminal Division's

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19. See “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions,” OECD Legal Instruments (Nov. 25, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378%20>; see also “OECD Raises the Bar with New Recommendations for Combating Bribery of Foreign Officials,” Debevoise in Depth (Dec. 3, 2021), <https://www.debevoise.com/insights/publications/2021/12/oecd-raises-the-bar-with-new-recommendations>.

20. Strategy at 27.

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Money Laundering and Asset Recovery Section's ("MLARS") Digital Currency Initiative and the Department's October 2020 Cryptocurrency Enforcement Framework.<sup>21</sup> The task force will focus on "crimes committed by virtual currency exchanges, mixing and tumbling services, and money laundering infrastructure actors."<sup>22</sup> It will also assist in recovering assets lost to fraud and extortion, such as paying ransomware groups with cryptocurrency. This will include collaboration with skilled private actors, federal agencies, and law enforcement, both domestic and abroad. The Strategy also calls for integrating this ongoing effort into the broader fight against corruption.

- **Asset recovery rewards.** Since 2010, the United States has facilitated the recovery and return of over \$1.7 billion in corrupt proceeds through the Kleptocracy Asset Recovery Initiative, which is overseen by MLARS. The Strategy seeks to strengthen this existing initiative, while also creating a new program that will further assist in the recovery of stolen assets. Pursuant to the 2021 National Defense Authorization Act, the Treasury Department is establishing a pilot Kleptocracy Asset Recovery Rewards Program, which seeks to incentivize the reporting of "stolen assets linked to foreign government corruption held at U.S. financial institutions"—which will provide law enforcement with more evidence to investigate and prosecute these cases.<sup>23</sup> The Strategy calls for this pilot program to complement the State Department's "Transnational Organized Crime Narcotics Rewards Programs."
- **Eradicating financial safe havens.** Led by the State Department, the Administration will create a Democracies Against Safe Havens (DASH) Initiative. DASH will seek to work internationally to prevent corrupt actors from utilizing financial safe havens, in particular by enhancing the impact of U.S. visa restrictions and sanctions regulations to increase pressure on corrupt actors through coordinated action among multiple countries.
- **Financial institution information sharing.** The Strategy emphasizes the need for financial institutions to share information about illicit activity in accordance with Section 314(b) of the USA PATRIOT Act. This statute provides a mechanism for law enforcement to engage with financial institutions, and for such institutions to share information with each other under a safe harbor that offers protection from liability. Although participation in information sharing under Section 314(b) is voluntary, FinCEN strongly encourages financial institutions to participate—a posture that is likely to grow even stronger.

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21. See "Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team," Justice News (Oct. 6, 2021), <https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team>.

22. Strategy at 25.

23. *Id.* at 26.

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### Pillar Four: Preserving and Strengthening the Multilateral Anti-Corruption Architecture

A consistent theme throughout the Strategy is its emphasis on an international, cooperative approach to combating corruption. This is the focus of Pillar Four, which commits to “strengthening the international architecture in which multilateral initiatives, agreements, and standards magnify and give legitimacy to anti-corruption efforts around the world.”<sup>24</sup>

Key priorities include the following:

- **International support and engagement.** The United States will provide financial support and expertise to the operation of international anti-corruption frameworks and will press foreign partners to fulfill their obligations to prosecute foreign bribery. The Administration is committed not only to implementing existing obligations under the UN Convention Against Corruption (“UNCAC”), but also to working with partners to find ways to strengthen UNCAC’s implementation.
- **Encouraging foreign bribery laws.** The Administration will assist partner governments in enacting and implementing foreign bribery laws, including through the OECD Working Group on Bribery. The U.S. will also adhere strongly to the norms and commitments set forth in the OECD Anti-Bribery Convention, as well as the new OECD recommendations referenced earlier, and promote those norms abroad.<sup>25</sup>
- **G7 and G20 engagement.** G7 and G20 members will be encouraged to implement robust transparency and anti-corruption measures, such as the standards of the Financial Action Task Force. These allies and partners will also be encouraged to collaborate with private sector and civil society stakeholders on anti-corruption and AML efforts.
- **International financial institutions.** The United States will reform and strengthen anti-corruption programming for international financial institutions, including improving internal mechanisms for rewarding “good governance.”<sup>26</sup>
- **Enhancing global partnerships.** There will be a continued effort to support the Open Government Partnership, an initiative that encourages collaboration between civil society and governments; and the Extractive Industries Transparency Initiative, which concerns corporate control over natural resource management.

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24. *Id.* at 13.

25. See “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions,” OECD Legal Instruments (Nov. 25, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378%20>; see also “OECD Raises the Bar with New Recommendations for Combating Bribery of Foreign Officials,” Debevoise in Depth (Dec. 3, 2021), <https://www.debevoise.com/insights/publications/2021/12/oecd-raises-the-bar-with-new-recommendations>.

26. Strategy at 33.

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### Pillar Five: Improving Diplomatic Engagement and Leveraging Foreign Assistance Resources to Advance Policy Objectives

In Pillar Five, the Strategy observes that international collaboration, while an integral part of the U.S. plan to curtail corruption, requires a carefully tailored approach so as to not “inadvertently reinforce corrupt power structures.”<sup>27</sup> In order to prevent such an outcome, the Administration intends to: (1) “elevate and expand the scale of diplomatic engagement and foreign assistance;” (2) protect those who work to eliminate corruption (e.g., whistleblowers, activists, and journalists); (3) “bolster the prevention and oversight capacities of willing governments;” (4)

**“The Administration’s success will hinge in part on whether federal agencies can secure necessary resources and effectively work together, and with overseas partners, to bring these ambitious plans and initiatives to fruition.”**

promote new technological advances in anti-corruption measures; (5) “improve consistency and risk analysis across foreign assistance;” and (6) “improve security assistance and integrate anti-corruption considerations into military planning, analysis, and operations.”

Key initiatives include:

- Increasing efforts to protect journalists, specifically through the United States Agency for International Development’s (“USAID”) “defense-only” liability coverage for defamation claims, and opposition to strategic lawsuits against public participation.<sup>28</sup>
- Creating two new funds to address “transnational organized crime” and corrupt state actors.<sup>29</sup> These include USAID’s Anti-Corruption Response Fund and the Global Anti-Corruption Rapid Response Fund.
- Evaluating and improving current U.S. security programs to promote internal accountability. The Administration will strengthen existing processes, as well as provide “greater transparency in military budgets, whistleblower protections, and oversight of the security sector.”<sup>30</sup>

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27. *Id.* at 14.

28. *Id.* at 35.

29. *Id.* at 36.

30. *Id.* at 38.

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### Conclusion

The Strategy could mark a significant milestone in U.S. efforts to root out global corruption. The Administration's success will hinge in part on whether federal agencies can secure necessary resources and effectively work together, and with overseas partners, to bring these ambitious plans and initiatives to fruition. To be sure, the tone from top enforcement officials at the SEC, DOJ, and Treasury, among other agencies, suggests a concerted effort is already underway to boost white collar enforcement, including in the areas of corruption, money laundering, and related offenses.

While the Strategy does not propose any particular changes to the FCPA or its enforcement regime, it signals more robust enforcement resulting from increased funding, greater law enforcement prioritization, enhanced information sharing among agencies (including from the intelligence community), and a determination to better coordinate with foreign partners, among other efforts. The Strategy also indicates an emphasis on criminalizing the demand side of bribery, whether through enacting new laws targeting foreign officials, using the money laundering statutes or other existing laws, or by encouraging foreign countries to enforce or enact their own applicable laws.

The Strategy also envisions various new AML regulations and initiatives, which could pose challenges for covered financial institutions and other entities—such as obligations to check for the underlying beneficial owner of an opaque entity. Investment advisors like private equity and hedge funds could face new AML requirements. Digital assets will be subjected to greater scrutiny around their use in furthering corruption and other criminal activities. The Strategy has a notable focus on gatekeepers, like lawyers, accountants, and trust service providers, with the goal of ensuring that such actors take steps to prevent corrupt conduct—and are held accountable when they instead facilitate it. These AML measures will need to be carefully monitored and, when implemented, compliance systems and controls will need to be updated accordingly.

Finally, the Strategy places emphasis on the U.S. government's own accountability—in particular, on ensuring that these directives are carried out successfully. Within the five pillars discussed above, there are 19 separate “strategic objectives,” made actionable through multiple specific lines of effort. The relevant federal agencies, coordinated by the National Security Council, have committed to reporting annually to the President on the progress made toward these goals.

Companies should act now to review proactively their compliance frameworks in anticipation of the new regulatory and enforcement environment that the Strategy heralds. Anti-corruption and AML compliance programs, in particular, should

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be given greater scrutiny. This includes assessing, for example, the adequacy of compliance programs' design, resourcing, and functioning, including tailoring to key risks and ensuring regular monitoring and testing. Strong internal whistleblower procedures and protections—in addition to a culture that encourages raising any compliance concerns—are likewise more critical than ever. We will continue to watch this space closely and provide updates regarding future developments.

**Andrew M. Levine**

**Winston M. Paes**

**Douglas S. Zolkind**

**Cara Ortiz**

**Jennifer Romero**

*Andrew M. Levine and Winston M. Paes are partners in the New York office. Douglas S. Zolkind is a counsel in the New York office. Cara Ortiz and Jennifer Romero are law clerks in the New York office. Full contact details for each author are available at [www.debevoise.com](http://www.debevoise.com).*

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## FCPA Update Interview: Peter Solmssen

*On December 17, 2021, Katelyn McNelis interviewed Peter Solmssen about the OECD's recently updated anti-corruption guidelines. Mr. Solmssen served as General Counsel to AIG, Siemens, and GE Healthcare, co-founded the Recommendation 6 Network, and chairs the International Bar Association's Non-trial Resolutions of Bribery Cases Subcommittee. This interview transcript has been edited for clarity and length.*

*Katelyn McNelis:* Mr. Solmssen, thank you so much for taking the time to sit down and discuss international anti-bribery recommendations for Debevoise & Plimpton's *FCPA Update*. To start, I would love it if you could tell us about your background, how you got involved in international anti-bribery legal work, and why you think it's important.

***Peter Solmssen:* I came to international anti-bribery work as sort of a consumer since I was a mergers and acquisitions lawyer, then later a corporate general counsel. Increasingly, anti-corruption became a huge issue. One of my clients, and later employer, the General Electric Company did a lot of acquisitions and they had figured out how to solve these problems in advance: they'd identify the problem—it was either a risk or maybe an indication there might be a bribery problem—and they figured out how to solve it before it became a bigger problem, generally in those days by going to the Justice Department and the SEC and wrapping it up before they did the acquisition or shortly thereafter.**

**When I moved on from GE to Siemens and then to AIG, I thought this practice that GE had sort of industrialized ought to be available to everybody, not just big companies. It's fairly easy for GE, Siemens, and AIG to do this [negotiations with the government] because they have significant experience and experts. But for smaller companies and foreign companies who are figuring out how to get ahead of the bribery problem and solve it in a collaborative effort with the government, this is a real change of mindset.**

*KM:* On November 25th of this year, the Organization for Economic Cooperation and Development (the "OECD") published updated anti-corruption guidelines governing OECD member countries and countries seeking OECD membership. However, there was a long road leading to these recommendations, really starting with the March 2017 Report from the OECD Secretary-General's High Level Advisory Group on Anti-Corruption and Integrity. You were a member of this Advisory Group: Could you walk us through what the Advisory Group did, why it was formed, and how you thought about formulating your recommendations to the OECD so your recommendations would have an impact?

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**PS:** The OECD is really a center of excellence for this kind of effort; it has an amazing amount of data, it has analysts and, of course, it's the source of the OECD treaty, which has led to a sea change in the fight against public corruption around the world. The OECD Secretary General thought at the time that the OECD could do more, so he called together people from different perspectives to come to the OECD with some ideas about what the OECD could do better. They had all kinds of people from academia and civil society; I was one of the few voices in the room from the private sector. It took us quite a while, but we came up with a lot of recommendations.

**KM:** How did you all come together and think about ways to work together to create recommendations for the Secretary General that you thought might actually come to fruition?

**PS:** We came from very different perspectives and so it took us a while to [identify] the things that we all thought made a difference. I went there with the intention of trying to get this notion of settling cases in advance of any sort of trial, maybe even in advance of any government investigation, taken up by anybody who'd listen. During those meetings, Tina Søreide, an economics professor from Norway, who has been studying bribery for many years, said the OECD should issue rules on how these settlements should be done. And I said, "That's a great idea." That became Recommendation Six to the OECD Secretary General.

**KM:** So you and Tina had already come together as part of this advisory group and realized that you shared similar views regarding getting countries to use non-trial resolutions to resolve these anti-bribery matters, and that's how the so-called "Recommendation 6 Network" came about. How did you gather other people and why did you think this specific recommendation regarding non-trial resolutions was important enough to merit this follow up?

**PS:** Well, Tina and I had worked together very closely within the High Level Advisory Group on the language of recommendation six. When we were done, it occurred to us pretty quickly that nothing further was going to happen, at least not soon. So we decided we would have to push for this to happen, and we put together an approximately 30-person group of academics, lawyers (mostly by design not from the United States), prosecutors, some former prosecutors, and one very brave acting prosecutor, and people from civil society to get a wide range of views. We [decided to try to] write what these guidelines should look like in a way that would satisfy all the people who are interested in this topic. That took a couple of years. We didn't have any money, we didn't have a mandate, we didn't have an organization; this was just a bunch of volunteers, meeting in Paris, meeting in Washington and drafting. At the same time, we were pitching to the

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**Working Group on Bribery that this would be a good idea and the members of the Recommendation 6 Network were speaking with country representatives in the Working Group on Bribery.**

**KM:** Can you talk a little bit about the pros and cons of non-trial resolutions, why you're so supportive of them, and why companies might be interested in using them?

**PS:** Well for businesses, it's an efficient . . . way of resolving a serious problem. If you find corruption, it comes up through audits or it comes up through whistleblowing or however it comes up, and then what do you do? For years the attitude had been: the government's never going to find it, let's just fix it and move on. And my own experience was that taking a more active approach had been a very efficient process, you can resolve the problem by settling in advance

**“The government has an interest in having an efficient solution, but companies have got to feel that they're better off settling than trying a case or fighting, and that includes having the right incentives for companies to come forward....”**

of any [litigation] with the various governments involved. So I was a big fan and I thought that this should be available to other companies. I also think it's a good idea when you have corporations acting as good corporate citizens and doing what they can to end bribery. That's a good thing from a social policy context.

**In the countries that ostensibly don't do this, there's a jurisprudence problem, which is that they think that the legal process should be seen through to the end for various philosophical reasons and I think the prosecutors, in many countries, frankly, didn't know how to do this. It sort of scared them.**

**KM:** Okay, so you have this Recommendation 6 Network, you put together this framework to suggest how the OECD could adopt a framework on using non-trial resolutions, so now a little more than three years after you publish these draft guidelines and principles, the OECD Working Group on Bribery published its Recommendation for OECD member countries. Before getting into the substance, I was wondering if you could talk a little about the process from your perspective for developing this new OECD guidance. What was the consultation process like, and who was involved?

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**PS:** The Working Group on Bribery and the OECD Secretariat that supports it had a consultation process where it heard, mostly in Zoom meetings, from governments and private entities. While these consultations were held, members of the International Bar Association and Recommendation 6 Network went to our national government agencies and had some very substantive conversations about how this might work. So while we were going to the formal consultations and giving presentations about why we thought [non-trial resolutions] ought to be done the way we were recommending they be done, we were also having bilateral conversations at the national level, all around the world. We were very pleased that substantively the OECD guidance addressed all of the issues that we raised in the way that we had hoped they would be addressed.

**KM:** Turning to the substance of the Recommendation, I was wondering if you could talk about the piece on non-trial resolutions and also the broader recommendations: what else was included in this guidance, and why do you think these recommendations are so important to have as a global framework to enforce these anti-corruption laws?

**PS:** The substantive things which are really important start with the notion that non-trial resolutions are a good thing. The OECD Recommendation doesn't actually require any member country to have a form of non-trial resolution and that was an important exception, but there's a very strong recommendation that they should *consider* using them, which is about as close to an endorsement as you're going to get out of this kind of body. And that is huge. Then a lot of it sort of follows the American playbook; the Americans have been doing this for a long time and have figured out what works and what doesn't and so you'll see things like: you've got to have the right incentives. The government has an interest in having an efficient solution, but companies have got to feel that they're better off settling than trying a case or fighting, and that includes having the right incentives for companies to come forward, not just negotiating a good outcome once they've been caught, but when they find things. One thing that is very important for people to understand is that companies have their eyes and ears on the ground. So you have companies around the world detecting bribery and turning over the bad guys to the government.

One thing you worry about as a company is that if you disclose to one country, other countries are going to find out about it, and you're going to have this sort of domino effect of being prosecuted in many jurisdictions and you multiply your exposure. That's addressed in a remarkable provision in the new OECD Recommendation that sort of creates a new principle of international law that

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doesn't exist anywhere, except inside the EU, that countries ought to cooperate in dividing the pie, not adding to the size of the pie, the pie being penalties. There are a lot of other things in the OECD Recommendation, but those are sort of the biggest ones for me in terms of looking at it from the companies' perspective.

*KM:* And from the perspective of OECD countries and countries that are potentially applying to become OECD members, how do you think that those new recommendations that you identified will be beneficial to them as well?

**PS:** I think around the world there are countries where there are good prosecutors trying to do the right thing, sometimes in a difficult environment and this gives them a tool where companies come to them and say, "You know you shouldn't prosecute me because I'm turning myself in, so you should give me a pass. And here are the names of the people in my company who were involved, and here are the names of the people in the government who are involved. And you should lock them all up." Once that practice is known, it has this deterrent effect. If you're a corrupt government official and you know that—in my case, I know this to be true because I was told this by our competitors when I was at GE—they wouldn't even ask us for bribes. It was too dangerous. One competitor told me we had a competitive advantage in bidding.

*KM:* Any final thoughts?

**PS:** The issue is the leadership experience and training. You don't need a lot of compliance guys running around if your business people know how to do this right and how to say, "No."

*KM:* Peter, thank you for taking the time to speak with us today and give us some insight on the process that helped lead to the new guidelines.

*Note: Debevoise partners Kara Brockmeyer and Bruce E. Yannett were part of the Recommendation 6 Network; Ms. Brockmeyer co-chairs the Non-Trial Resolution subcommittee of the IBA's Anti-Corruption Committee with Mr. Solmssen and Tom Best.*

# FCPA Update

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**Debevoise & Plimpton LLP**

919 Third Avenue  
New York, New York 10022  
+1 212 909 6000  
www.debevoise.com

**Washington, D.C.**  
+1 202 383 8000

**San Francisco**  
+1 415 738 5700

**London**  
+44 20 7786 9000

**Paris**  
+33 1 40 73 12 12

**Frankfurt**  
+49 69 2097 5000

**Moscow**  
+7 495 956 3858

**Hong Kong**  
+852 2160 9800

**Shanghai**  
+86 21 5047 1800

**Luxembourg**  
+352 27 33 54 00

**Bruce E. Yannett**  
Co-Editor-in-Chief  
+1 212 909 6495  
beyannett@debevoise.com

**Andrew J. Ceresney**  
Co-Editor-in-Chief  
+1 212 909 6947  
aceresney@debevoise.com

**David A. O'Neil**  
Co-Editor-in-Chief  
+1 202 383 8040  
daoneil@debevoise.com

**Karolos Seeger**  
Co-Editor-in-Chief  
+44 20 7786 9042  
kseeger@debevoise.com

**Erich O. Grosz**  
Co-Executive Editor  
+1 212 909 6808  
eogrosz@debevoise.com

**Douglas S. Zolkind**  
Co-Executive Editor  
+1 212 909 6804  
dzolkind@debevoise.com

**Kara Brockmeyer**  
Co-Editor-in-Chief  
+1 202 383 8120  
kbrockmeyer@debevoise.com

**Andrew M. Levine**  
Co-Editor-in-Chief  
+1 212 909 6069  
amlevine@debevoise.com

**Winston M. Paes**  
Co-Editor-in-Chief  
+1 212 909 6896  
wmpaes@debevoise.com

**Jane Shvets**  
Co-Editor-in-Chief  
+44 20 7786 9163  
jshvets@debevoise.com

**Philip Rohlik**  
Co-Executive Editor  
+852 2160 9856  
prohlik@debevoise.com

**Andreas A. Glimenakis**  
Associate Editor  
+1 202 383 8138  
aaglimen@debevoise.com

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